

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
JAMES M. and MARY JANE NAPIER
and RICHARD L. and DANA
SHERMAN,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
and JAY RICHARD LIAN,

Respondents.

PCHB Nos. 84-299 and 84-303

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter involves separate Notices of Appeal taken by appellant James M. and Mary Jane Napier (under PCHB No. 84-299) and Richard L. and Dana Sherman (under PCHB No. 84-303) to the issuance of Surface Water Permit, Application No. S2-26461, to Jay Richard Lian, by Department of Ecology. The issues and the subject matter of both Notices of Appeal are the same. It further appeared that a consolidation of the Notices of Appeal would expedite their disposition, avoid duplication of testimony and not prejudice the

1 rights of the parties. Accordingly, these cases were consolidated for
2 hearing.

3 This matter came on before the Pollution Control Hearings Board;
4 Lawrence J. Faulk (presiding), Gayle Rothrock, and Wick Dufford, on
5 February 8, 1985, Lacey. Respondent elected a formal hearing pursuant
6 to RCW 43.21B.230. Lisa Flechtner officially reported the proceedings.

7 Appellants represented themselves. Respondent Department of
8 Ecology (DOE) was represented by Assistant Attorney General Allen T.
9 Miller, Jr. Permittee Jay Richard Lian represented himself.

10 Witnesses were sworn and testified. Exhibits were admitted and
11 examined. Argument was heard. From the testimony, evidence and
12 contentions of the parties, the Board makes these

13 FINDINGS OF FACT

14 I

15 On December 15, 1983, respondent Lian filed with the Department of
16 Ecology a Surface Water Application No. S2-26461. On March 26, 1984,
17 appellant Napier filed Surface Water Application No. S2-26505. On
18 April 16, 1984, appellant Sherman filed Surface Water Application No.
19 S2-26522. Withdrawals of water for all applications are proposed to
20 be from an unnamed spring which is a tributary to Ward Creek in
21 Pacific County.

22 II

23 Each of the three parties in this case requested 0.02 cubic feet
24 per second (9 gallons per minute) for domestic use on a continuous
25 basis.

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III

Historically, the spring in question has supplied domestic water for the three homes now occupied by the Lians, Napiers and Shermans. All such use has been without benefit of permission issued pursuant to the Water Code of 1917. No competent evidence pinpoints the inception of usage. There is no evidence that any user of the source filed a claim pursuant to the water rights claims registration statute, chapter 90.14 RCW.

IV

A delivery system from the spring has evolved over time. At present, outflow from the spring is collected in several 55 gallon drums. From these drums, a line leads down gradient to a 1,000 gallon storage tank. From this tank, lines lead to the Sherman's and Napier's houses. The overflow from the 55 gallon drums and any spring waters not captured in these drums flow a natural depression to a storage pond and a sunken concrete cistern (open at the bottom to allow infiltration). Water is pumped from the cistern to the Lian's house.

V

The spring itself is on lands belonging to Weyerhaeuser Company. Appellants Sherman and Napier have secured permission from the Company for a pipeline across its land. The Lians have no right of way problem, because the water that escapes the collection system at the spring arrives by gravity at their doorstep.

VI

There is no evidence that any domestic water supply system serving the public is available to these rural families. Ward Creek is brackish and subject to tidal influence as it passes the Lian, Napier and Sherman homes.

VII

The outflow of the spring does not form a continuous watercourse in which any fish resources or other instream values have been identified.

VIII

On April 23, 1984, a representative of DOE traveled to the site and performed a field investigation. The inspector discussed respondent Lian's application with Mr. Lian's family and with appellant Napier. The flow from the collection system at the spring measured 2.5 gallons per minute on this day.

IX

On August 22, 1984, the DOE performed another field investigation. The DOE inspector discussed the applications with Mr. Sherman, Mr. Napier and Mr. Lian. The flow from the collection system at the spring measured 2.0 gallons per minute on this day.

X

On September 17, 1984, the Department issued three Reports of Examination recommending that each party receive a permit for 0.01 cubic feet per second (4.5 gallons per minute) as a maximum instantaneous withdrawal rate, limited to a quantity of one acre-foot

1 per year.

2 XI

3 Each report contained the investigator's conclusion that adequate
4 water for domestic service to three households is not available
5 without the development of additional storage capacity. In testimony,
6 DOE's investigator stated that 800-900 gallons per day per family is
7 necessary for an adequate supply.

8 The present collection system at the spring does not capture the
9 entire outflow. However, only two gallons per minute on a continuous
10 basis would generate 2,880 gallons per day, enough for the three
11 households even under low flow conditions.

12 DOE's investigator concluded that with improved storage, enough
13 water could be made available to accommodate the potential uses and
14 users.

15 XII

16 DOE's regional resource management supervisor testified that he
17 believed the most workable approach would be to build one efficient
18 collection system with three outflow pipes all at the same elevation,
19 each leading to an individual storage tank on each lot. This would
20 give all users an equal share of the available supply in a manner
21 which is essentially self-regulating.

22 XIII

23 The three parties have not been able to agree to develop a system
24 jointly. The Lians have refused to join in any common project because
25 of concerns about expense.

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XIV

Appellants Napier feeling aggrieved by the recommendation in the report on the Lian application filed an appeal with this Board on October 26, 1984. Appellants Sherman also feeling aggrieved by the Lian report filed an appeal with this Board on October 29, 1984.

The appellants object to the Lians' receiving the first priority for water from the spring. They also assert that there is not, in fact, enough water available to supply all three homes. Under the circumstances, they believe that the Lians' share should not be the lion's share.

XV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. RCW 43.21B.

II

Under RCW 90.03.290, DOE must make four determinations prior to the issuance of a permit to appropriate; (1) what water, if any, is available; (2) to what beneficial uses is the water to be applied; (3) will the appropriation impair existing rights; and (4) will the appropriation detrimentally affect the public welfare. Stempel v. Board of Water Resources, 82 Wn. 2d, 109, 115, 508 P.2d 166 (1977).

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1 In the instant case, there is no question of beneficial use.
2 Domestic use is unquestionably beneficial. RCW 90.54.020(1). There
3 is also no question as to impairment of existing rights. In the
4 absence of evidence both of the early-day use and of any registration
5 of claims, any rights which come into existence on this source must be
6 acquired pursuant to the statutory procedure of the Water Code of
7 1917. Department of Ecology v. Abbott, 104 Wn 2d 686, ___ P. 2d ___,
8 (1985); Department of Ecology v. Adsit, 103 Wn 2d 698, ___ P. 2d ___,
9 (1985). To date no statutory permits, leading to such rights, have
10 been issued. Thus, the water availability and public interest
11 criteria are the focus of this case.

12 III

13 Specific standards, such as water availability, are, of course,
14 just examples of the encompassing public interest criterion. More
15 definite content is given to this broad term by provisions of the
16 Water Resources Act of 1971 and by policy language within the Water
17 Code itself. Particularly relevant here are the provisions of RCW
18 90.54.020(2) and RCW 90.03.005.

19 The former requires that the allocation of water among potential
20 uses and users be based on securing the "maximum net benefits for the
21 people of the state." The latter also sets forth a policy for
22 obtaining "maximum net benefits" and enjoins DOE to reduce wasteful
23 practices in the exercise of rights to the "maximum extent
24 practicable."

25 These modern enactments flesh out the language of the 1917 Code
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1 which commands the state permit authority to pay "due regard to the
2 highest feasible development of the use of waters belonging to the
3 public." RCW 90.03.290.

4 The net effect is the legislative expression of a policy that
5 individual applications not be considered in isolation, but rather in
6 the context of competing demands for the resource.

7 IV

8 Where, as here, there are several applications for use of water
9 from the same source pending simultaneously, the appropriate thing is
10 to consider them together, in light of the policies for maximizing
11 benefits, preventing waste and fully using the resource.¹ This is,
12 in effect, what DOE has done in this case.

13 V

14 Where, as here, there are no identified instream values to protect
15 and the competing applications are all for the same amount and type of
16 use, there is no basis upon which to prefer allocation to one use or
17 user over another.

18 Under the circumstances of this case, the maximization policies of
19 the law are served by allotting the supply equally to the several
20 applicants. This is particularly appropriate in this instance because
21 the uses are in existence and have been going on for some time and the
22

23 1. While a permit applicant's place in line may be an "existing
24 right" in some sense, Schuh v. Department of Ecology, 100 Wn 2d
25 180, 187, 667 P. 2d 64 (1983), it is clearly not a right such as
26 to prevent evaluating an application in light of other potential
27 uses and users. See, e.g., Tanner v. Bacon, 103 Utah 494, 136 P.
2d 957 (1943).

1 only thing that differentiates the parties is that one managed to get
2 his application in slightly ahead of the others.

3 VI

4 The DOE has attempted to divide the supply into three equal parts,
5 but has acknowledged that additional storage is necessary in order for
6 enough water to be available for the beneficial use of all. Inherent
7 in this conclusion is the proposition that water is not "available for
8 appropriation" for any of these applicants unless that applicant
9 contributes his share to the development of additional storage.

10 This applies to the Lians as well as to the Napiers and Shermans.
11 No reason in law, logic or fairness commands that the Lians be free of
12 a condition respecting adding to the storage necessary to make
13 adequate water available to, all members of the applicant pool before
14 the DOE. Indeed, if the Lians' permit is not so conditioned, "the
15 tenet of water law which precludes wasteful practices" might well be
16 violated. See RCW 90.03.005.

17 VII

18 It is not clear from the Report of Examination how the DOE intends
19 to condition the Lian's permit, given the expressed need for
20 additional storage.²

21 If DOE intends to include a condition such as the following, its
22 decision should be sustained:

23
24 2. There can be no question of DOE's power to condition the Lian's
25 permit, consistent with the policies of the statutes, since DOE
26 has the discretionary power to deny a permit altogether. See
27 State v. Crown Zellerbach, 92 Wn.2d 894, 602 P.2d 1172 (1979); and
Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979).

1 This permit is issued subject to the permittees'
2 being required to furnish or contribute his
3 proportionate share to additional storage in the
4 system in order for the available supply to be
adequate for three households. Unless proof of such
action is made during the development period for this
permit, no certificate of water right shall issue.

5 If DOE does not so intend, its decision should be reversed on the
6 grounds that water is not "available" for appropriation and that
7 granting the permit "threatens to prove detrimental to the public
8 interest." RCW 90.03.290.

9 VIII

10 The Lians' priority position, as the first applicant, is
11 established by statute, RCW 90.03.340. If and when they perfect their
12 right by complying with the conditions of their permit, their priority
13 date will be December 15, 1983.

14 If there were ever a shortage so severe that all three households
15 could not obtain the full amount of their rights, DOE (or any court
16 applied to) would be faced with a question of enforcement discretion,
17 recognizing both the priority principle and the equities of the
18 situation. However considering the prerequisite for development of
19 additional storage, the application of the priority principle in an
20 enforcement context appears to be a highly theoretical possibility.

21 IX

22 Any Finding of Fact which is deemed a Conclusion of Law is hereby
23 adopted as such.

24 From these Conclusions of Law the Board enters this
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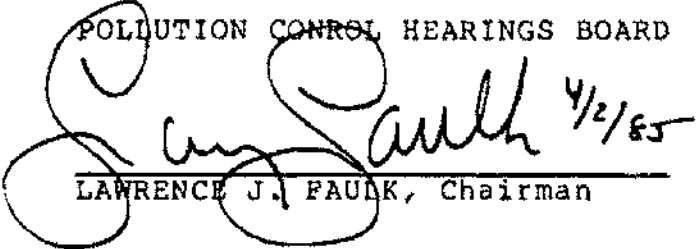
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ORDER


DOE's decision on Surface Water Application S2-26461 is remanded to the Department for action consistent with this Opinion.

DONE this 3rd day of April, 1985.

POLLUTION CONTROL HEARINGS BOARD

 4/2/85
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member


GAYLE ROTHROCK, Vice Chairman